APPEAL NO. 93089

This appeal arises under the Texas Workers' Compensation Act (1989 Act), TEX. REV. CIV. STAT. ANN. arts. 8308-1.01-11.10 (Vernon Supp. 1993). A contested case hearing was held in (city), Texas on November 10, 1992 to determine two issues: whether the claimant had reached maximum medical improvement (MMI) on April 20, 1992 and, if so, what was claimant's impairment rating. Hearing officer (hearing officer) determined that the treating doctor's Report of Medical Evaluation (Form TWCC-69) was not filed with the claimant within 7 days of April 20th; that the claimant filed a request for a benefit review conference protesting the certification on July 28, 1992; that the claimant did not reach MMI on April 20th, therefore, the treating doctor's 0% impairment rating is not valid; that the treating doctor did not fully comply with Commission Rule 130.2 by sending timely notification to the claimant; and that because the claimant received actual notice of the MMI certification on or about April 30, 1992, the claimant's protest of the impairment rating would be considered timely under Rule 130.5(e). The hearing officer held that the claimant had not reached MMI and thus could not be assessed an impairment rating, and ordered the carrier, who is appealing this decision, to pay Temporary Income Benefits (TIBs) to the claimant beginning with the day the carrier ceased paying TIBs because of the 0% impairment rating. No response was filed by the claimant.

DECISION

The decision and order of the hearing officer is affirmed.

The claimant, who was employed by (employer), suffered a compensable injury to his back on (date of injury). He was first treated by Dr. M, but later chose Dr. H as his treating doctor. Dr. H July 18th report said the claimant's CT scan disclosed a bulge posteriorly at L5-S1, 3mm with possible stenosis, minimal bulge at L4-5. He diagnosed lumbar radicular syndrome, and recommended a 5-day stabilization program and caudal epidural. Because of claimant's continued pain following the latter procedure, the claimant was referred to the Spinal and Chronic Pain Center for rehabilitation on September 30th. However, he was discharged on October 8th because a urine and serum toxicity screen tested positive for cocaine and cocaine metabolite. A written report of that date said he could return after one month off cocaine, with the plan that "we must continue to focus on helping [claimant] work toward maximum medical improvement."

The claimant subsequently was twice re-admitted and discharged from the program for the same reason. An undated discharge summary signed by Dr. F stated in part as follows:

> Though it does appear that [claimant] is not attempting to take advantage of the system by drawing out his workman comp's (sic) check it does appear that he is for all purposes reach (sic) maximum medical improvement within the confines of the treatment that is available to him. To that end we will commute to his referring physician Dr. H that perhaps maximum medical

benefit has been reached at this point. Should [claimant] be able to detox himself from his cocaine use then his rehabilitation could continue and his impairment status might be re-evaluated.

Apparently sometime thereafter Dr. H completed a TWCC-69 certifying MMI as of April 20, 1992, with a 0% impairment rating. The form makes reference to an attached letter which was not in evidence.

Dr. F note dated March 23, 1992 stated claimant came to his office and said he was attempting to get into a 90-day drug rehab program through the Salvation Army. Dr. F wrote, "since [claimant] is going into a three month program and will not be able to return to see us until the program is over . . . [he] will return to the Pain Center after he has completed the drug rehab program."

The claimant testified that on or about May 1st he received his last check for TIBs from the carrier, along with a statement that his income benefits were being terminated because he had reached MMI on April 20th with a 0% impairment. (The evidence includes a Form TWCC-21, Payment of Compensation or Notice of Refused/Disputed Claim and a copy of the envelope in which claimant said he received it, postmarked April 30, 1992.) He said he went to Dr. H office and obtained a copy of his TWCC-69. He also called the Commission and was told he needed to fill out a dispute form. He then visited an attorney, who apparently made a telephone call to the carrier in an unsuccessful attempt to get benefits reinstated. Thereafter, claimant said he retrieved the completed form from the attorney and hand-delivered it to the Commission on June 8th. The evidence shows a dispute resolution form date-stamped as received on July 28th, listing as disputed issues: date of MMI; impairment rating; and extent of disability. A request for setting a benefit review conference (Form TWCC-45) signed by the claimant was also in the record, date-stamped by the Commission on July 28th.

A June 8th letter from Dr. H to the carrier stated that claimant on that date had been evaluated in a follow up visit, that he had been through the detoxification program, and that he now desired to be treated through the pain program. He was re-admitted to the Spinal and Chronic Pain Center on June 29th.

Two additional Form TWCC-69s signed by Dr. H were made part of the record. The first stated, "Report from evaluation 8/17/92. Pt has been through extensive rehabilitative efforts. Remains with intractable back & leg pain. Hn (sic) become a candidate for diagnostic evaluation. Pt remains unable to work as he has since his injury 4/12/91." The response to the question, "[h]as employee reached maximum medical improvement?" was answered in the negative, with an estimated date of "unknown." The second TWCC-69 was identical, except that it also stated "[a]mended 8/17/92 retroactive to 4/20/92."

At the hearing the carrier contended that the claimant had not disputed Dr. H MMI certification or impairment rating within 90 days, as required by rule, Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.5 (Rule 130.5) and that, as such, the impairment rating had become final.

The hearing officer made disputed findings of fact and conclusions of law as follows:

FINDINGS OF FACT

7.Copy of the above referenced Report of Medical Evaluation was not filed with the Claimant within 7 days of April 20, 1992, thus, the Claimant was not made aware of the doctor's assessment until on or about April 30, 1992.

8.The claimant filed a request for Benefit Review Conference protesting the above referenced certification on July 28, 1992.

CONCLUSIONS OF LAW

2.The Claimant did not reach maximum medical improvement on April 20, 1992; therefore the 0% impairment rating made by Dr. H is not valid.

3.Dr. H did not fully comply with the requirements delineated in commission Rule 130.2 by sending timely notification of his assessment to the Claimant.

4.Because the Claimant received actual notice of the doctor's April 20, 1992, certification on or about April 30, 1992, the Claimant's protest of the impairment rating on July 28, 1992, would be considered timely under commission Rule 130.5(e).

On appeal, the carrier argues that there is no evidence, or alternatively, insufficient evidence that the first TWCC-69 was not timely sent to the claimant and the carrier; that the impairment rating was not disputed within 90 days thereof and thus has become final; that while the claimant was aware of the MMI certification and the impairment rating by April 30th, there was no dispute filed within the following 90 days; that claimant's written request for setting a benefit review conference listed only "cessation of weekly compensation benefits since April 30, 1992" as the reason for the request and did not mention impairment or MMI; that the hearing officer should not have invalidated the 0% impairment rating because the same was final and not subject to attack, and could not be rescinded by the same doctor.

Rule 130.5(e) provides in pertinent part that "the first impairment rating assigned to

an employee is considered final if the rating is not disputed within 90 days after the rating is assigned." The Appeals Panel has held that timely dispute under the rule is also required where a claimant disputes MMI. Texas Workers' Compensation Commission Appeal No. 92693, decided February 8, 1993. This panel also has previously held that the 90-day time period does not necessarily run from the date the rating is actually assigned by the doctor. *See* Texas Workers' Compensation Commission Appeal No. 92542, decided November 30, 1992; Texas Workers' Compensation Commission Appeal No. 92670, decided February 1, 1993.

We note initially that this panel has held that the result of not filing a doctor's report on time is that an administrative penalty, under Article 8308-10.03(c)(3), can be imposed; it does not mean the doctor's opinion should be disallowed as a professional opinion or certification of MMI. Texas Workers' Compensation Commission Appeal No. 92670, *supra*.

The claimant in this case testified that he did not receive a copy of this report until he went to Dr. H office to obtain one; this was sometime after he received actual notice (in the form of the TWCC-21 terminating his TIBs due to MMI and the 0% impairment rating), a date the hearing officer found to be April 30th. Ninety days from April 30th would be July 29th; thus, the claimant's filing with the Commission of a statement of disputed issues and request for benefit review conference on July 28th would constitute timely dispute, so long as the language therein served to adequately notify the Commission that such a dispute exists. The notification requirement is important because it triggers the appointment of a designated doctor to attempt to resolve the dispute and to expeditiously move the case to the next level of the dispute resolution process. *See* Rule 130.6.

The reason given for the request for setting a benefit review conference is "Cessation of weekly compensation benefits since April 30, 1992." The dispute resolution form lists as "Disputed Issue(s): (Brief Description)" date of MMI and impairment rating. It is signed by the Commission disability determination officer whom the claimant testified he spoke to several times with regard to the fact that he was disputing Dr. H certification of MMI and impairment. We find this sufficient evidence to support the hearing officer's decision that the claimant's July 28, 1992 protest of Dr. H April 20th certification of MMI and impairment would be considered timely under Rule 130.5(e). *See also* Texas Workers' Compensation Commission Appeal No. 93046, decided March 5, 1993 (Carrier's TWCC-21 which disputed method of certification held to be a timely dispute of MMI and impairment).

Despite the foregoing, the hearing officer also determined that the claimant did not reach MMI on April 20th and, therefore, cannot be assessed an impairment rating. In evidence was Dr. H first TWCC-69, without the attached narrative (which may or may not have made it a complete certification). *See* Rule 130.1. Also in evidence were his subsequent TWCC-69s which found MMI had not been reached. This panel has previously determined that a doctor can amend or revise his or her prior determination of MMI or

impairment, under proper circumstances, recognizing that resolution of questions of MMI and impairment should not be indefinitely deferred to an open-ended series of tests. Texas Workers' Compensation Commission Appeal No. 92570, decided December 14, 1992. *See also* Texas Workers' Compensation Commission Appeal No. 92639, decided January 14, 1993 (correction or amendment of the first report generated by a designated doctor, especially when the first document was based on incomplete or erroneous facts, which is done fairly soon after the first report, may be given presumptive weight). The hearing officer was entitled to weigh these documents and give the latter more weight. Upon review of the evidence, we find supportable the hearing officer's determination that claimant had not reached MMI and thus could not be assessed an impairment rating.

Finally, the carrier complains that the hearing officer failed to include in his decision the fact that he took official notice of the Commission's claim file on this matter which, it alleges, constitutes *prima facia* evidence of the absence of a "dispute" filed with the Commission between April 20, and July 20, 1992. While we believe it is always preferable for the hearing officer, when taking official notice of any document, to so state in his decision, the failure to do so in this case is harmless error in light of his holding, which we affirm, that claimant's July 28th filings would constitute timely notice of dispute.

The decision and order of the hearing officer is affirmed.

_____
Lynda H. Nesenholtz
Appeals Judge

CONCUR:

_____
Joe Sebesta
Appeals Judge

FILING A CONCURRING OPINION:

I concur with the decision; however, feel it appropriate to note this decision does not address or otherwise determine the situation where a claimant, who because of his own misconduct in abusing drugs, cannot undergo appropriate treatment for an injury. This matter was not raised and was not developed in the course of the resolution of this case and therefore, is not a determinative consideration in the disposition of this appeal.

_____
Stark O. Sanders, Jr.
Chief Appeals Judge